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No. _____

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In The

Supreme Court of the United States

October Term, 1989

GARY STANGLER,
Director of the Department of Social
Services of the State of Missouri,

Petitioner,

v.

MARIETTA DARLING, on behalf of herself
and all others similarly situated; and
THE GRAY PANTHERS ADVOCACY COMMITTEE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

WILLIAM L. WEBSTER
Attorney General

ROBERT L. PRESSON
Assistant Attorney General

6th Floor, Broadway Building
Post Office Box 899
Jefferson City, Missouri 65102
(314) 751-8784

Attorneys for Petitioner

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COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

May a federal court ignore the literal meaning of the plain language of an act of Congress as well as the interpretation by the federal agency charged with its enforcement, and instead interpret the statute to effect the Court's conception of Congressional purpose in the absence of clear and convincing legislative history reflecting such purpose?

May a federal court in interpreting an amendment to Title XIX of the Social Security Act (Medicaid) interpret the amendment in such a way as to negate or modify a state's status under § 209(b), 42 U.S.C. § 1396a(f), when neither the language of the amendment nor the legislative history concerning its adoption reflects any intent on the part of Congress to modify or negate a state's 209(b) status?

Does § 12202 of the Consolidated Omnibus Reconciliation Act of 1986, 42 U.S.C. § 1383c(b), require "§ 209(b) states" to disregard any portion of the 1984 increases in Social Security benefits for disabled widows and widowers in determining their eligibility for Medicaid?

LIST OF PARTIES

In addition to the parties identified in the caption of the case, Otis R. Bowen, Secretary of the Department of Health and Human Services and the Health Care Financing Administration were defendants in the litigation below.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioner, Gary Stangler[1], Director of the Department of Social Services of the State of Missouri, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit in this case.

[1] Gary Stangler is the successor in office to Michael V. Reagan and is substituted as a party herein pursuant to Supreme Court Rule 40.3.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (Appendix A, pp. A1-A18) is reported at 878 F.2d 1069. The opinion of the United States District Court for the Western District of Missouri, St. Joseph Division (Appendix B, pp. A21-A41) is reported at 685 F.Supp. 1125 (W.D. Mo. 1988).

JURISDICTION

On May 12, 1988, the United States District Court for the Western District of Missouri entered a memorandum opinion and on June 15, 1988, entered its judgment thereon, awarding the plaintiffs declaratory and injunctive relief under § 12202 of the Consolidated Omnibus Budget Reconciliation Act of 1986, 42 U.S.C. § 1383c(b). On June 28, 1989, the United States Court of Appeals for the Eighth Circuit affirmed the judgment of the United States District Court for the Western District of Missouri. Thereafter, on September 7, 1989, the United States Court of Appeals for the Eighth Circuit denied a timely petition for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1383c(b)
42 U.S.C. § 1396a(f)

The pertinent text of each statute is set forth in Appendix C pursuant to Rule 15(f) of the Supreme Court Rules.

STATEMENT OF THE CASE

In 1965, Congress enacted Title XIX of the Social Security Act, 42 U.S.C. § 1396, *et seq.*, (Medicaid) as a cooperative state-federal program of providing medical assistance to low income individuals. Under the program, the federal government provides financial assistance to the states that choose to reimburse certain costs of medical treatment. In order to secure federal financial assistance, a state electing to participate in the Medicaid program must submit a state plan which complies with the requirements of 42 U.S.C. § 1396a(a). Failure to comply with the terms and conditions of participation as set forth in either Title XIX or the regulations promulgated by the Secretary of Health and Human Services is grounds for loss of federal financial participation.

As originally enacted, the Medicaid program required states to provide medical assistance to individuals who received cash payments under one of the four welfare programs established elsewhere in the Act – Old Age Assistance, Aid to Families with Dependent Children, Aid to the Blind and Aid to the Permanently and Totally Disabled. Individuals qualifying for Medicaid assistance by virtue of receipt of aid under one of these programs were generally referred to as "categorically needy." See generally, *Schweiker v. Gray Panthers*, 453 U.S. 34, 37-39 (1981).

In 1972, Congress enacted a new program called Supplemental Security Income for the Aged, Blind and Disabled (SSI) which replaced three of the four "categorical assistance" programs – Old Age Assistance, Aid to the Blind and Aid to the Permanently Disabled. The federal government assumed the responsibility for funding the new SSI program, displacing the states both in funding and setting of standards of need. In some states, the number of individuals eligible for assistance under the new SSI program was significantly larger than had been eligible under the earlier categorical programs. Because Congress retained the requirement that recipients of categorical welfare assistance, now including the new SSI program, were entitled to Medicaid benefits, some states faced significant increases in Medicaid obligations. Fearing that states would withdraw from the Medicaid program because of the expanded coverage, Congress enacted the so-called "§ 209(b) option." 42 U.S.C. § 1396a(f). Section 209(b) was enacted "in order not to impose a substantial fiscal burden on these states" or discourage them from participating in the Medicaid program. Senate Report No. 93-553, p. 56 (1973). Under the 209(b) option, a state was required to operate a program assisting the medically needy but it could elect to provide Medicaid coverage only to those individuals who would be eligible under the state Medicaid plan in effect on January 1, 1972. *Herweg v. Ray*, 455 U.S. 265, 268 (1982). States electing this option were required to adopt a "spend-down" provision under which an individual whose income exceeded the state eligibility standard could become eligible for Medicaid when that part of his income in excess of the state standard was consumed by

expenses for medical care. *Schweiker v. Gray Panthers, supra* at 39, n. 5. Thus, "the section 209(b) option allows the states to avoid the effect of the link between the SSI and Medicaid programs." *Herweg v. Ray, supra* at 268. Therefore, under the Medicaid program, states are either "SSI states" or "§ 209(b) states" depending upon whether they provide Medicaid assistance to all SSI recipients or only to those individuals who meet their own eligibility standards.

Until 1988 a § 209(b) state could not create eligibility standards for Medicaid which were more liberal than those that existed for SSI eligibility, *Savage v. Toan*, 795 F.2d 643, 646 (8th Cir. 1986), but it could set Medicaid eligibility standards which were more restrictive than those for SSI, so long as those requirements were not more restrictive than those which were in effect under its plan as of January 1, 1972. 42 CFR 435.121. § 209(b) states remain free to change the eligibility criteria at any time. Even when a 209(b) state establishes its income eligibility level for Medicaid at the same dollar amount as the eligibility for SSI, the individual's receipt of SSI benefits is not, in and of itself, determinative of Medicaid eligibility under the state's criteria. A 209(b) state may, as in the case of Missouri, establish more restrictive eligibility requirements for assets or property.

In January, 1984, Congress increased social security benefits to disabled widows and widowers. Public Law No. 98-21, § 134, 97 Stat. 65, 97-98. The increase in benefits raised the income of some beneficiaries above the eligibility level for SSI or for optional State Supplemental Payments ("SSP"), thereby causing the loss of SSI/SSP and, consequently, the loss of Medicaid eligibility in SSI

states. Senate Report No. 99-146, 99th Congress, 2nd Session, 1, 331 reprinted in 1986 U.S. Code Congressional and Administrative News 42, 296.

In April 1986, Congress passed § 12202 of the Consolidated Omnibus Budget Reconciliation Act of 1986 (COBRA), 42 U.S.C. § 1383c(b), the statutory provision at issue in this case. Section 12202 of COBRA provides that an "eligible disabled widow or widower", as defined in subsection (b)(2), "not eligible for benefits under this subchapter", i.e. SSI/SSP, "shall be deemed for purposes of subchapter XIX", i.e. Medicaid, "to be an individual with respect to whom benefits under this subchapter", i.e. SSI/SSP, "are paid . . . if he or she . . . would be eligible for benefits under this subchapter", i.e. SSI/SSP, "if the amount of the increase described in paragraph (2)(C)", i.e. the increase in Social Security benefits for disabled widows and widowers, "were disregarded." In other words, eligible widows and widowers meeting the requirements of the Act would be deemed, for purposes of Medicaid, to be recipients of SSI/SSP.

The effect of the provision in 209(b) states in which receipt of SSI benefits is not determinative of Medicaid eligibility has been the focal point of this litigation. In July 1986, the Health Care Financing Administration (HCFA) of the Department of Health and Human Services (HHS) issued transmittal number IM 86-2 (Appendix D, p. A41) to all states advising them of § 12202 of COBRA. In that transmittal, HCFA advised that 209(b) states could elect to disregard all or any part of the amount of an individual's benefit increase in determining whether he or she was eligible for Medicaid because in those states

receipt of SSI/SSP benefits did not necessarily guarantee eligibility for Medicaid. See Appendix D.

The named individual plaintiff in this case, Marietta Darling, is a resident of the State of Missouri, a § 209(b) state, and is a disabled widow of a Social Security covered wage earner who has numerous physical problems. Prior to 1984, plaintiff had been eligible for SSI and was eligible for Medicaid under the state plan without a spend-down. Prior to the January 1984 increase in Social Security benefits, she had been receiving $277.00 per month in Social Security benefits and $56.30 per month in SSI benefits. Following the increase in Social Security benefits, plaintiff received $389.60 per month in Social Security benefits and was ineligible for SSI benefits. Subsequent cost of living increases in the Social Security benefits increased the total to $421.00 per month during 1987. Plaintiff also pays $18.00 per month for Medicare Part B coverage.

After the increase in Social Security benefits, plaintiff was eligible for Medicaid under the Missouri plan only with a spend-down. The amount of the spend-down was calculated by subtracting an automatic $20.00 deductible and her $18.00 per month insurance payment from her monthly income of $421.00, leaving $383.00 countable income per month. During 1987, the State of Missouri's income eligibility level for Medicaid was $340.00 per month. Thus, there was excess income of $43.00 per month which computed on a quarterly basis amounted to a spend-down of $129.00. In answer to interrogatories, plaintiff claimed that she had foregone medical care which would total $196.00 per month. On a quarterly

basis, this would have amounted to $588.00. Thus, plaintiff could have received reimbursement of $459.00 for each quarter if she had applied and met her spend-down requirement of $129.00 per quarter.

Plaintiff filed a class action suit on behalf of disabled widows and widowers in 209(b) states naming as defendants the Secretary of HHS, HCFA and the Director of the Department of Social Services for the State of Missouri. Plaintiff challenged HCFA's interpretation of § 12202 of COBRA and maintained that she was an eligible disabled widow under 42 U.S.C. § 1383c(b).

The District Court granted class certification for the class of eligible individuals in 13 of the 14 209(b) states.[2] The District Court also certified subclasses of eligible individuals in the State of Missouri and eligible individuals in other 209(b) states in which the state's income eligibility standard was the same as the SSI eligibility standard. On the merits, the District Court held that, while the defendants offered "a more plausible literal meaning of the controlling language", . . . "plaintiff offer[ed] a much more plausible statement of Congressional intent." The court ordered the federal government to withdraw transmittal number IM 86-2 and concluded that § 12202 of COBRA should be construed to mean that eligible widows and widowers should be deemed "to be receiving no more income than would qualify for" SSI benefits. See Appendix B, p. A35.

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[2] The district court excluded Illinois because it was subject to a prior court order concerning this same issue.

Petitioner filed a notice of appeal on July 11, 1988. The Court of Appeals affirmed in an opinion issued on June 28, 1989 and rehearing was denied on September 7, 1989. The alternative request for a rehearing en banc was denied because "of the lack of a majority of the active judges voting to rehear the cases en banc." Appendix A, p. A19. On September 18, 1989, the court granted the plaintiffs' motion for remand for consideration of attorney's fees but indicated that it was advisable to delay consideration of fees because the "case is a close one and further review may be sought." Appendix A, p. A20.

REASONS FOR GRANTING THE PETITION

The sole issue in this case is the construction of § 12202 of the Consolidated Omnibus Budget Reconciliation Act of 1986 (COBRA), 42 U.S.C. § 1383c(b). This section provided that disabled widows or widowers who lost Supplemental Security Income (SSI) or State Supplemental payments (SSP) by reason of an increase of Social Security benefits are deemed to be receiving either SSI or SSP for purposes of determining their entitlement to Medicaid. There is no dispute that in the so-called "SSI states" the effect of this provision is clear because the receipt of SSI, whether actual or deemed, would automatically entitle the recipient to Medicaid coverage. However, in "209(b) states", such as Missouri, where there is no affirmative link between the receipt of SSI and eligibility for Medicaid, the parties have disagreed as to the effect, if any, to be accorded to § 12202 of COBRA.

The Court of Appeals below affirmed the district court's construction that § 12202 of COBRA meant that the deeming of receipt of SSI benefits would also mean deeming that individual to receive no more income than would qualify them for SSI benefits. Thus, the judgment below would require 209(b) states to deem these individuals to be receiving a level of income consistent with SSI benefits. Both the Court of Appeals and the district court adopted this construction in spite of the recognition that the defendants had offered "a more plausible literal meaning of the controlling language". Appendix A, p. A13; Appendix B, p. A31.

I.

The Opinion Below is Inconsistent with Principles of Statutory Construction Enunciated by This Court

The Court of Appeals below, relying upon this Court's opinion in *Bob Jones University v. United States*, 461 U.S. 574 (1983), opined that this was an appropriate instance for it to go beyond the plain language of the statute in order to effectuate Congressional intent. However, this Court has repeatedly cautioned that the language of the statute must ordinarily be regarded as conclusive absent a clearly expressed legislative intention to the contrary. *Consumer Product Safety Commission v. GTE Sylvania Inc.*, 474 U.S. 102, 108 (1980); *Burlington Northern Railroad Company v. Oklahoma Tax Commission*, 107 S.Ct. 1855, 1860 (1987); and *United States v. James*, 478 U.S. 597, 606 (1986). Thus, the instances in which a Court's perception of legislative intent will override the clear and unambiguous language of a statute have been

described as "rare" and "exceptional". *United States v. James, supra. Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982); *Rubin v. United States*, 449 U.S. 424, 430 (1981).

That federal courts may possess some authority to avoid the literal meaning of a Congressional enactment is not to be taken as a roving commission, undertaken in every case, to look elsewhere than at the statute itself for evidence of Congressional intent. Thus, this Court has stated that:

> "There is, of course, no more persuasive evidence of the purpose of the statute than the words by which the legislature undertook to give expression to its wishes."

United States v. American Trucking Associations, Inc., 310 U.S. 534, 543 (1940); *Griffin v. Oceanic Contractors Inc., supra* at 570; *Board of Governors of the Federal Reserve System v. Dimension Financial Corp.*, 474 U.S. 361, 373 (1986). To hold otherwise would actually prevent the effectuation of Congressional intent.

> "[a]pplication of 'broad purposes' of legislation at the expense of specific provisions ignores the complexity of the problems Congress is called upon to address and the dynamics of legislative action. Congress may be unanimous in its intent to stamp out some vague social or economic evils; however, because its members may differ sharply on the means for effectuating that intent, the final language of the legislation may reflect hard-fought compromises. Invocation of the 'plain purpose' of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent." *Id.* at 373-374.

As a result, this Court has imposed an extremely high standard upon courts before they may override the plain meaning of statutory language for the ostensible purpose of effectuating legislative intent. In *Bob Jones University v. United States, supra,* at 586, this Court relied upon "unmistakable evidence" regarding Congressional intent. In *Burlington Northern Railroad Company v. Oklahoma Tax Commission, supra,* at 1860 and *United States v. James, supra,* at 606, this Court indicated that there must be "clearly expressed legislative intention to the contrary". In *Griffin v. Oceanic Contractors, Inc., supra* at 571, the Court indicated that statutory language is controlling unless it is "demonstrably at odds with the intentions of its drafters". The opinion of the Court below and the basis that it identifies as a reason for disregarding the literal meaning of § 12202 of COBRA simply failed to meet these rigorous standards.

The construction of § 12202 of COBRA by the Court below is also at odds with the construction adopted by the Secretary of Health and Human Services. However, this Court has held that if "the agency regulation is not in conflict with the plain language of the statute, a reviewing court must give deference to the agency's interpretation of the statute." *K-Mart Corp. v. Cartier, Inc.,* 108 S.Ct. 1811, 1817 (1988). It is noted above, that both the Court of Appeals and the District Court agreed that the defendants, including the secretary of HHS, had offered the more plausible interpretation of the literal language of the statute. Thus, the defendants' interpretation was both reasonable and not in conflict with the plain language of the statute. Although the judiciary remains the final authority on statutory construction and must reject an

administrative interpretation which is contrary to clearly expressed congressional intent, the opinion below reflects merely a disagreement with the agency over the proper interpretation. This, however, is not compatible with the deference which is owed to an administrative interpretation.

> "The Court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the Court would have reached if the question initially had arisen in a judicial proceeding."

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 n. 11 (1984).

In identifying a legislative intent sufficient to override the plain language of a statute, the foregoing decisions indicate that this Court has looked to the general purpose and language of the statute, the legislative history and other provisions of the statutory scheme. Similar analysis in this case, however, fails to demonstrate a sufficient basis for ignoring the plain language of the statute.

A.

The Opinion Below is Not Supported by the Language of the Statute.

In rejecting the defendants' "more plausible" interpretation, the Court of Appeals found that the overall purpose of § 12202 of COBRA was the "disregard of [the] increase [of Social Security benefits] for Medicaid purposes." Appendix A, p. A14. However, that conclusion of

legislative intent is not borne out by the language of the statute itself. Section 12202 of COBRA does not require a disregard of any income, let alone the increase in Social Security benefits. By its own language, § 12202 provides that certain individuals will be deemed SSI recipients "if the amount of the increase . . . were disregarded". 42 U.S.C. § 1383c(b)(1)(B). Thus, far from mandating a disregard of the increase in benefits, the statute only assumes a disregard of the increase.

The Court of Appeals below also expressed the opinion that it believed that § 12202 of COBRA was "clearly designed to remove the adverse effects on Medicaid eligibility caused by the 1984 increases". Appendix A, p. A14. However, it is undeniably clear that even under the construction adopted by the court below, not all of the adverse consequences stemming from the 1984 increases in Social Security benefits would be eliminated. The applicability of § 12202 of COBRA is, by the most explicit statutory language, limited only to those individuals who lost SSI or SSP benefits because of those increased Social Security benefits. By concluding that § 12202 of COBRA was designed to remove all adverse effects of those increased Social Security benefits, the Court of Appeals incorrectly assumed that the increase of benefits was enough for all recipients to lose either SSI or SSP benefits.

For notice purposes, HCFA provided to the states a list of potentially eligible individuals. The list was not inclusive of all individuals receiving disabled widow[er]'s benefits. One of the criteria applied by HCFA in identifying people on the list was the loss of SSI benefits. If a disabled widow[er] had not lost SSI, then he or she was simply not on the list. However, depending on

how each 209(b) state defines its eligibility standards, these individuals could have lost their eligibility for Medicaid without losing their SSI benefits. Any such individual is simply not in the class defined by § 12202 of COBRA. Thus, even under the opinion of the Court of Appeals there would remain a group "to suffer the consequences" of the increase in Social Security benefits. However, this is at odds with the Court's apparent belief that it was Congress' intent to remove all of the adverse consequences. The end result of the opinion below is that the Court of Appeals evidently believes Congress intended to remove more, but not all, of the adverse consequences than would be removed by an application of the plain statutory language. Petitioner submits that this is a highly dubious proposition and does not establish the sort of demonstrably contrary intent which will be necessary to override the plain statutory language.

B.

The Opinion Below is Not Supported by Legislative History.

In addition to the statutory language itself, the Court of Appeals believed the remedial goals of § 12202 of COBRA were reflected in "its brief legislative history". The only legislative history available on § 12202 of COBRA is a one paragraph reference contained in Senate Report No. 99-146. See Appendix A, pp. A16-A17.

According to this legislative history, Congress recognized that as a result of the increase in Social Security

benefits "some beneficiaries lost eligibility for Supplemental Security Income (SSI) and, consequently, Medicaid." The report then goes on to state that § 12202 of COBRA provides that those "who lost SSI eligibility" may "be deemed to be receiving SSI benefits for the purpose of Medicaid eligibility." Petitioner believes that it is obvious Congress was concerned with a particular group of individuals: those who lost eligibility for Medicaid as a result of their loss of eligibility for SSI. However, the Court of Appeals rejected that interpretation and stated that the language of the Senate Report "indicates an intent to remove adverse effects on Medicaid that occurred nationwide" and that it does not contain "any explicit indication that relief was intended to reach only a portion of affected individuals." Appendix A, p. A17.

Petitioner submits that this interpretation is at odds not only with the statutory language but the plain language of the Senate Report. The Senate Report undeniably referred to a particular group which had lost Medicaid eligibility as a result of losing SSI eligibility. To believe, as did the Court of Appeals below, that the statute reflected a broader purpose flies in the face of the plain language. Even if the language of the legislative history, as brief as it is, does not absolutely foreclose the interpretation of the Court of Appeals, it is only because the language of the legislative history may be viewed as somewhat ambiguous and not because there is any affirmative language in the legislative history to support the interpretation of the Court of Appeals. Petitioner submits, however, that mere ambiguity in a legislative history is not the sort of clear or unmistakable legislative

intent which this Court has indicated is necessary to override the plain meaning of statutory language.

C.

The Interpretation of the Court of Appeals is Not Supported by Reference to Other Sections of the Act.

Because in § 209(b) states receipt of SSI benefits is not determinative of whether an individual is eligible for Medicaid without a spend-down, the interpretation of the Court of Appeals below works a significant modification of the status of 209(b) states. In other words, the Court has read into § 209(b) an additional exception. However, because the 209(b) option is such a significant part of the 1972 amendments to the Social Security Act, petitioner submits that a modification of that status or the creation of some exception to it should require explicit language to that effect.

Congress has demonstrated its awareness of the significance of a state's 209(b) status. In 42 U.S.C. § 1382h, Congress provided that, within certain limits, SSI recipients who would cease to be eligible for those benefits because of earnings from gainful activities should nevertheless continue to be eligible and "shall be considered a disabled individual receiving supplemental security benefits" for purposes of subchapter XIX, i.e., Medicaid. This provision was enacted in 1980. However, as in the present situation, considering (or deeming) individuals to be SSI recipients for Medicaid purposes had no effect in 209(b) states. Thus, in 1986, Congress amended the foregoing section to provide that in a 209(b) state any defined individual "shall remain eligible for medical assistance".

The intention to specifically amend this section to apply to 209(b) states was reflected in the legislative history. Senate Report 99-466, reprinted in 6 U.S. Code Congressional Administrative News, 99th Congress, 2nd session, p. 6096 (1986). Thus, during the very session of Congress that enacted 12202 of COBRA, Congress enacted legislation which demonstrated (1) its awareness of the difference between 209(b) states and SSI states, (2) its awareness that legislation may have a different impact or no impact because of that difference and (3) its ability to directly impact 209(b) states when it wishes to do so. On the other hand, there is no indication in the language of § 12202 of COBRA or its history to indicate that Congress intended to create some exception to a state's 209(b) status as it had done in the amendment to 42 U.S.C. § 1382h(b). Because this amendment, as well as § 12202 of COBRA, were enacted in the same session, petitioner submits that it is highly dubious to conclude that Congress simply chose the wrong words in enacting § 12202 of COBRA. Congress has given every indication that it knows how to accomplish the purpose that the Court of Appeals held that it meant to accomplish in § 12202 of COBRA.

In addition, the opinion below is based upon the idea that Congress intended to deduct or disregard a portion of the increase in Social Security benefits in making the Medicaid eligibility determination. However, Congress has, when it intended to, enacted specific provisions which require a deduction or a disregard of income in making eligibility determinations. Section 209(b) itself requires states to deduct SSI benefits from overall income in applying a state's eligibility standards. More recently,

Congress enacted Public Law 99-643 Sections 3(d) and 10(b) which specifically require states to disregard certain benefits in determining the amounts of contribution by an individual to the cost of care. See 42 U.S.C. § 1396a(1) (1986 amendments). Thus, if Congress had merely intended a disregard of income, it could have easily accomplished that rather than going through the process of deeming certain individuals to be SSI recipients. Petitioner submits that the holding of the Court of Appeals below regarding Congressional purpose in the enactment of § 12202 of COBRA is simply not consistent with other provisions of the act.

D.

The Opinion Below is Based upon Misconceptions of Law.

In the proceedings below the defendants argued that Congress had been primarily concerned with those individuals who had lost all access to Medicaid by virtue of their loss of SSI status. In other words, Congress was primarily concerned with the availability of Medicaid to individuals who had received increased Social Security benefits. However, in 209(b) states, individuals could still become eligible for Medicaid by spending down to the state eligibility standard. The Court of Appeals rejected this argument because the 1984 increases "substantially impair their actual ability to meet the spend-down without foregoing basic necessities of life." Appendix A, p. A15. However, the Court of Appeals failed to recognize that the 1984 increases in benefits augmented the ability of a 209(b) state resident to meet a spend-down assuming

that the increase in benefits had been large enough so that that individual was no longer eligible under the state's own standard. Thus, the increase in Social Security benefits would provide them with more cash benefits with which to meet any spend-down and to still maintain their eligibility for Medicaid. However, in an SSI state, even a small increase in Social Security benefits could mean total loss of the more valuable Medicaid benefits, with no recourse to a spend-down. Since this would be a far greater detriment than having to meet a spend-down in a 209(b) state, it would be consistent with a Congressional intent to give priority to that situation which is what the defendants contended § 12202 of COBRA did.

Further, the interpretation of the Court of Appeals is dependent upon its belief that in the absence of its interpretation, § 12202 of COBRA would have no effect at all in 209(b) states. Petitioner submits that that belief is simply incorrect. Both the Court of Appeals and the district court concentrated primarily on SSI benefits mentioned in § 12202 of COBRA. This is understandable because that is how the plaintiffs proceeded with their case. However, in determining the overall intention of § 12202 of COBRA, it must be kept in mind that the deemed status applies to SSP benefits as well as SSI benefits. In Missouri, receipt of optional SSP benefits carries with it an automatic entitlement to Medicaid. However, Missouri determined that none of its recipients of optional SSP benefits were adversely affected by the increase in Social Security benefits in 1984. The plaintiffs have not questioned that position. Whether that is true in other 209(b) states is not apparent from the record below. Thus, in some 209(b) states, a deemed status of being an

SSP recipient might very well have some significance. However, a judicial interpretation which is based solely upon the SSI aspect of § 12202 of COBRA overlooks a significant aspect of the statute and constitutes a rather significant omission in a case in which the Court concludes that statutory purpose overrides the plain meaning of the language.

The Court of Appeals below evidently felt that it could not interpret § 12202 of COBRA as the defendants had argued, and as the plain language of the statute would require, because that would result in inequitable and discriminatory treatment between individuals in SSI states and 209(b) states. What the Court simply failed to recognize, however, was that the very nature of the 209(b) option means that individuals in 209(b) states will be treated differently than individuals in SSI states, whether that is viewed as inequitable or not. The opinion below, therefore, appears to reflect nothing more than the court's disagreement with the 209(b) option Congress provided. However, it is not for the judiciary to reflect upon the wisdom of a legislative enactment. *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 194-195 (1978). Even should a statute have unexpected or harsh results, that alone is not enough for the judiciary to refuse to enforce such a statute. Such effects are more appropriately remedied by the legislature and not the courts. *Griffin v. Oceanic Contractors, Inc., supra* at 575.

In summary, the statutory interpretation by the Court of Appeals, based upon its finding of Congressional intent, at the expense of the literal language of the statute, is not founded upon any basis sufficient to meet the rigorous standard established by this Court.

II.

The Potential Impact of the Opinion of the Court of Appeals Justifies Review by This Court.

The opinion of the Court of Appeals and its questionable application of principles of statutory construction will, at a minimum, impact upon 13 of the 14 209(b) states. While that is of significance in and of itself, petitioner submits that the potential impact of the lower court's opinion is even broader. This is because other provisions in the Medicaid act contain provisions similar to § 12202 of COBRA. One of these is the so-called "Pickle Amendment", 42 U.S.C. § 1396a (note), which is discussed in *Lynch v. Rank*, 604 F.Supp. 30 (N.D., Cal. 1984), *aff'd* 747 F.2d 528 (9th Cir. 1984). Although the Pickle Amendment does not use the word "deemed" it does provide that one who receives Social Security and who had once received SSI but was now ineligible for SSI because of an increase in Social Security benefits would be eligible for Medicaid "in like manner and subject to the same terms and conditions as are applicable under such state plan in the case of individuals who are eligible for and receiving" SSI benefits. 747 F.2d at 530-531.

Further, following the enactment of § 12202 of COBRA, Congress enacted the Omnibus Budget Reconciliation Act of 1987, § 9116 of which provided that certain persons "shall nevertheless be deemed to be a recipient of supplemental security income benefits under this title for purposes of title XIX . . . " 42 U.S.C., § 1383c(d). Thus, Congress has on other occasions either deemed a particular status to exist or provided that individuals should be treated as if they had that status. In

either case, petitioner submits that the opinion of the Court of Appeals below would seriously call in to question the meaning of those provisions, their application to 209(b) states and cause confusion in the administration of the Medicaid program if one had to not only deem or assume the particular status but subsidiary characteristics of that status. Because, as noted above, Congress has enacted explicit provisions calling for disregarding of income or benefits at the same time that it is enacted these deeming provisions, it must be presumed that Congress knows the difference. The conclusion of the Court of Appeals that a deeming provision, in and of itself, requires a disregard of income fails to appreciate the difference between these types of provisions and may inadvertently impact upon other sections in which Congress has made a deliberate choice to enact one type of provision or the other. Confusion regarding the administration of such a significant social program as Medicaid should be avoided if at all possible.

In addition, the opinion of the Court of Appeals in effect holds that the different treatment regarding Medicaid eligibility which is authorized by the very existence of the 209(b) option can be overridden in subsequent legislation even in which there is no specific mention of § 209(b) and the legislative history is devoid of any reference to § 209(b). If all subsequent amendments to the Medicaid Act require an avoidance of any difference in treatment between SSI states and 209(b) states, then the 209(b) option has been implicitly, and judicially, overruled.

Petitioner submits that these potential consequences of the opinion of the Court of Appeals below are significant enough to warrant review by this Court.

CONCLUSION

Because the statutory interpretation adopted by the Court of Appeals below is inconsistent with principles adopted by this Court and because of the potential far-reaching effects of the opinion below, the petition for writ of certiorari should be granted.

WILLIAM L. WEBSTER
Attorney General

ROBERT L. PRESSON
Assistant Attorney General

6th Floor, Broadway Building
Post Office Box 899
Jefferson City, Missouri 65102
(314) 751-8784

Attorneys for Petitioner

APPENDIX A
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-2210

Marietta Darling, et al.,

Appellees,

v.

Otis R. Bowen, M.D., Secretary of the Department of Health and Human Services; and the Health Care Financing Administration,

Appellants.

Appeals from the United States District Court for the Western District of Missouri.

No. 88-2098

Marietta Darling, et al.,

Appellees,

v.

Michael Reagen, Director of the Department of Social Services of the State of Missouri,

Appellant.

Submitted: January 9, 1989

Filed: June 28, 1989

Before **WOLLMAN**, Circuit Judge, **FLOYD R. GIBSON**, Senior Circuit Judge, and **BEAM**, Circuit Judge.

FLOYD R. GIBSON, Senior Circuit Judge.

The issue in this case is the effect of section 12202 of the Consolidated Omnibus Budget Reconciliation Act of 1986 (COBRA), 42 U.S.C. § 1383c(b), in which Congress attempted to remove the unintended adverse effects on certain individuals' Medicaid entitlement caused by increases in their disability benefits. Section 12202 provides that disabled widows and widowers who lost Supplemental Security Income (SSI) as a result of certain increases in their social security benefits are deemed for purposes of Medicaid entitlement to be individuals to whom SSI benefits are paid if they would be eligible for SSI if the increases were disregarded. Specifically, we must decide what effect this section has in states, known as "209(b) states", which have exercised their option not to provide Medicaid automatically to individuals who qualify for SSI, but, rather, define Medicaid eligibility according to their own resources and income criteria. In July 1986 the Health Care Financing Administration (HCFA), a branch of the Department of Health and Human Services (HHS), issued Transmittal No. 1M 86-2, providing that because SSI eligibility does not necessarily guarantee Medicaid eligibility in 209(b) states, section 12202 of COBRA does not require 209(b) states to disregard the relevant social security increases in determining Medicaid eligibility. Marietta Darling, as representative of the class of widows and widowers in 209(b) states adversely affected by the HCFA's Transmittal, filed this class

action to challenge the HCFA's interpretation of section 12202. Appellants herein are the Secretary of HHS and the HCFA (collectively, the federal appellants), and the Director of the Department of Social Services of the State of Missouri. The district court[1] ordered the federal appellants to withdraw Transmittal No. 1M 86-2 and promptly notify all 209(b) states that they must tender the full relief mandated by section 12202 of COBRA. *Darling v. Bowen*, 685 F. Supp. 1125, 1131 (W.D. Mo. 1988). We now affirm.

I. BACKGROUND

A. The "209(b)" Option

In order to understand the issue presented in this case, it is first necessary to review some history regarding the Medicaid program and the social security eligibility of disabled widow(er)s. The Medicaid program, established in 1965 as Title XIX of the Social Security Act, 42 U.S.C. § 1396 *et seq.*, "provid[es] federal financial assistance to States that choose to reimburse certain costs of medical treatment for needy persons." *Harris v. McRae*, 448 U.S. 297, 301 (1980). Initially, the Medicaid program required participating states to provide medical assistance to persons who received payments under one of four welfare programs established elsewhere in the Social Security Act. These programs were Old Age Assistance, Aid to Families with Dependent Children, Aid to the Blind, and Aid to the Permanently and Totally Disabled. Persons receiving aid under one of these four programs

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[1] The Honorable Howard F. Sachs, United States District Judge for the Western District of Missouri.

were referred to as the "categorically needy." *See generally Schweiker v. Gray Panthers*, 453 U.S. 34, 37 (1981).

Since Medicaid's enactment, however, the social security programs have undergone substantial change. In 1972, Congress restructured the social security programs and replaced three of the four above-mentioned welfare programs with a new program entitled Supplemental Security Income for the Aged, Blind, and Disabled (SSI), 42 U.S.C. § 1381 *et seq*. Under SSI, the federal government assumed responsibility for both the funding of payments and setting the eligibility standards. In addition, Congress retained the requirement that all recipients of categorical welfare assistance - now including the new SSI program - were also entitled to Medicaid. Because the new SSI standards were broader than those that had existed before, a consequence of this restructuring was that the number of individuals eligible for Medicaid increased significantly in many states. Congress was concerned that states whose Medicaid liability increased as a result of SSI would withdraw from the Medicaid program. Thus, it offered to the states what is known as the section 209(b) option, set forth in 42 U.S.C. § 1396a (f). *See generally Schweiker v. Gray Panthers*, 453 U.S. at 38-39.[2]

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[2] Section 209(b) provides in pertinent part:

> Notwithstanding any other provision of this subchapter, * * * no State not eligible to participate in the State plan program established under subchapter XVI of this chapter shall be required to provide medical assistance to any aged, blind, or disabled individual (within the meaning of subchapter XVI of

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Under this option, states can opt out of the requirement of providing Medicaid assistance automatically to persons who receive SSI and elect instead to provide Medicaid assistance only to those individuals who would have been eligible under the state Medicaid plan in effect on January 1, 1972. "In other words, the § 209(b) option allows the States to avoid the effect of the link between the SSI and Medicaid programs: States may become either '§ 209(b) States' or 'SSI States.' " *Herweg v. Ray*, 455 U.S. 265, 268 (1982).

States exercising the 209(b) option are also required to adopt a "spend-down" provision, under which an individual whose income exceeds the state standard can

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> this chapter) for any month unless such State would be (or would have been) required to provide medical assistance to such individual for such month had its plan for medical assistance approved under this subchapter and in effect on January 1, 1972, been in effect in such month, except that for this purpose any such individual shall be deemed eligible for medical assistance under such State plan if (in addition to meeting such other requirements as are or may be imposed under the State plan) the income of any such individual as determined in accordance with section 1396b(f) of this title (after deducting any supplemental security income payment and State supplementary payment made with respect to such individual, and incurred expenses for medical care as recognized under State law) is not in excess of the standard for medical assistance established under the State plan as in effect on January 1, 1972.

42 U.S.C. § 1396a(f) (1982).

become eligible for Medicaid when the excess (that part of his or her income that exceeds the state standard) is consumed by expenses for medical care. *Schweiker v. Gray Panthers*, 453 U.S. at 39 n.5. Fourteen states have elected the 209(b) option.

B. 1984 Social Security Increases and COBRA

In 1983, Congress enacted legislation to increase the social security benefits and create periodic cost of living adjustments for disabled widows and widowers. Social Security Amendments of 1983, Pub. L. No. 98-21, § 134, 1983 U.S. Code Cong. & Admin. News (97 Stat.) 97-98. These increases, which became effective in 1984, raised the incomes of some recipients above the eligibility level for SSI. In SSI states, beneficiaries whose incomes were pushed over the SSI eligibility level by the increases automatically lost Medicaid because, as explained above, in those states SSI eligibility is determinative of Medicaid eligibility. Beneficiaries in 209(b) states also suffered adverse Medicaid effects in that they were forced after the increases to pay increased spend-downs in order to receive Medicaid.[3]

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[3] According to the appellees, the 1984 increases not only forced affected individuals in 209(b) states to meet increased spend-downs but also rendered some entirely ineligible for Medicaid. The appellees base this assertion on the claim that the opportunity to spend-down is available only to individuals who are otherwise eligible for SSI. Thus, the appellees explain, individuals in 209(b) states whose incomes rose above the SSI eligibility level after the increases lost the opportunity to

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In 1986, Congress sought to eliminate the adverse impact of the 1984 social security increases on individuals' Medicaid entitlement by enacting section 12202 of COBRA, the statutory provision at issue in this case. Section 12202 essentially provides that a disabled widow(er) who lost SSI entitlement as a result of the 1984 social security increases "shall be deemed for purposes of [Medicaid] to be an individual with respect to whom [SSI] benefits * * * are paid * * * if he or she * * * would be eligible for [SSI] benefits * * * if the [1984 increases in widow(er)s' benefits] were disregarded". 42 U.S.C. § 1383c (b) (Supp. IV 1986).[4] Section 12202 also directs the

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spend-down and consequently were left with no access to Medicaid. The appellants disagree with the premise that the opportunity to spend-down is available only to individuals otherwise eligible for SSI. Thus, according to the appellants, the 1984 increases did not have the effect in 209(b) states of removing the availability of Medicaid for any beneficiaries. We need not resolve this question in this case; our conclusion regarding the correct interpretation of section 12202 is not governed by whether or not SSI eligibility is a prerequisite to the opportunity to spend-down. In either event, the 1984 increases seriously impaired the ability of affected individuals in 209(b) states to secure medical assistance.

[4] The full text of the relevant portion of section 12202 provides:

> (1) An eligible disabled widow or widower (described in paragraph (2)) who is entitled to a widow's or widower's insurance benefit based on a disability for any month under section 402(e) or (f) of this title but is not eligible for benefits under this subchapter [SSI] in that month, and who applies for

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Secretary of HHS to provide each state with the names of individuals receiving widow(er)s' benefits who might

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the protection of this subsection under paragraph (3), shall be deemed for purposes of subchapter XIX [Medicaid] of this chapter to be an individual with respect to whom benefits under this subchapter [SSI] are paid in that month if he or she -

(A) has been continuously entitled to such widow's or widower's insurance benefits from the first month for which the increase described in paragraph (2) (C) was reflected in such benefits through the month involved, and

(B) would be eligible for benefits under this subchapter [SSI] in the month involved if the amount of the increase described in paragraph (2) (C) in his or her widow's or widower's insurance benefits, and any subsequent cost-of-living adjustments in such benefits under section 415(i) of this title, were disregarded.

(2) For purposes of paragraph (1), the term "eligible disabled widow or widower" means an individual who -

(A) was entitled to a monthly insurance benefit under subchapter II of this chapter for December 1983,

(B) was entitled to a widow's or widower's insurance benefit based on a disability under section 402 (e) or (f) of this title for January 1984 and with respect to whom a benefit under this subchapter was paid in that month, and

(C) because of the increase in the amount of his or her widow's or widower's insurance

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qualify for medical assistance by reason of the application of section 12202. COBRA, Pub. L. No. 99-272, § 12202(b), 100 Stat. 82, 291, 1986 U.S. Code Cong. & Admin. News 291 (not codified in 42 U.S.C. § 1383c). Further, section 12202 instructs the states, after receiving the names of eligible persons, to promptly notify such persons of their right to make application for assistance. *Id.* Congress originally required that potential beneficiaries of the provision apply for protected status before July 1, 1987. However, in the Omnibus Budget Reconciliation Act of 1987, Congress extended that period until July 1, 1988. Pub. L. No. 100-203, § 9108, 1987 U.S. Code Cong. & Admin. News (101 Stat.) 1330-302.

In July 1986 HCFA sent Transmittal No. 1M 86-2 to all states advising them of the requirements of section 12202. The Transmittal contained a statement specifically addressing the application of section 12202 in 209(b) states, providing that

> because eligibility for SSI/SSP benefits does not necessarily guarantee eligibility for Medicaid in a 209(b) State, such States may not be required to provide Medicaid to individuals solely

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> benefits which resulted from the amendments made by section 134 of the Social Security Amendments of 1983 (Public Law 98-21) (eliminating the additional reduction factor for disabled widows and widowers under age 60), was ineligible for benefits under this subchapter [SSI] in the first month in which such increase was paid to him or her (and in which a retroactive payment of such increase for prior months was not made).

42 U.S.C. § 1383c(b) (Supp. IV 1986).

> because they meet [the COBRA] criteria. Assuming the individual meets all [other] criteria, the State *may elect* to disregard all or any part of the amount by which the individual's benefit increased, as well as subsequent cost-of-living (COLA) increases, in determining whether he or she is eligible for Medicaid as categorically needy.

Darling, 685 F. Supp. at 1129 (emphasis added). Seven of the fourteen 209(b) states have taken advantage of the option stated in the Transmittal and have not disregarded the 1984 social security increases in determining Medicaid eligibility. *Id.*

Marietta Darling filed this suit against the Secretary of HHS and the HCFA to challenge the HCFA's above-quoted interpretation of section 12202 of COBRA. Darling is a 63-year old disabled widow of a former social security covered wage earner. Prior to the 1984 increases in widow(er)s' social security benefits, Darling was receiving both SSI and Medicaid. As a result of the 1984 increases, she ceased to be eligible for both SSI and Medicaid under Missouri's section 209(b) plan. Darling sought certification of a class of disabled widow(er)s in 209(b) states who have been or may be harmed by the HCFA's position stated in Transmittal No. 1M 86-2 that 209(b) states are not required by section 12202 to disregard the 1984 social security increases to disabled widow(er)s in determining Medicaid eligibility.

The district court granted class certification for a class of eligible disabled widow(er)s (as defined in 42

U.S.C. 1383c(b) (2) of COBRA) in 209(b) states.[5] As to the merits, the district court granted the plaintiffs' motion for summary judgment and ordered the federal defendants to "withdraw Transmittal No. 1M 86-2, insofar as it purports to give an option to 209(b) states to disregard the relief mandated by § 12202 of COBRA, and promptly notify the 209(b) states that they must tender the full relief mandated by § 12202 of COBRA." *Id.* at 1131. The district court further ordered that "the time for making application for relief in 209(b) states shall not expire July 1, 1988, but shall expire in a reasonable time (no less than six months) after eligible disabled widows and widowers in such states have been given appropriate notice of their right to file written applications for protection." *Id.* at 1331-32.[6]

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[5] The certified class did not include residents of Illinois, a 209(b) state, because relief similar to that sought here was afforded in *Hill v. Duffy*, No. 87-5208 (S.D. Ill. July 31, 1987). The district court also granted certification for two subclasses. The first includes Missouri residents who receive the disabled widow(er)s' payments and have lost SSI entitlement as a result of the 1984 increases. The district court reasoned that "eligible Missourians may have a special claim to relief in that while SSI *entitlement* as such is not a factor in determining benefits under the Missouri Medicaid plan, SSI entitlement *income* is the controlling income factor under that plan." *Darling*, 685 F. Supp. at 1126 (footnote omitted). The second subclass consists of eligible disabled widow(er)s "who are residents of Missouri and all other 209(b) states that [, like Missouri,] use SSI entitlement income as the controlling income factor under their Medicaid plans." *Id.* at 1126-27 (footnote omitted).

[6] Since the original decision, the district court has issued two subsequent orders. The appellants herein have filed

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For reasons to be explained, we affirm the decision of the district court and hold that the deeming provision of section 12202 of COBRA deems eligible individuals to be receiving no more income than would qualify them for SSI benefits and thus effectively mandates 209(b) states to disregard, for Medicaid purposes, the 1984 increases for eligible individuals to the extent necessary to reduce their incomes to the SSI eligibility level.

II. DISCUSSION

The portion of section 12202 that is at issue in this case provides that an eligible disabled widow(er) who lost SSI entitlement as a result of the 1984 social security increases "shall be deemed for purposes of [Medicaid] to be an individual with respect to whom [SSI] benefits * * * are paid * * * if he or she * * * would be eligible for [SSI] benefits * * * if the amount of the [1984 increases] were disregarded." 42 U.S.C. § 1383c(b)(1) (Supp. IV 1986).

The appellants argue essentially that the plain language of section 12202 does not mandate a disregard of benefits to any individuals. Rather, they argue, the statute only deems a status (being an individual to whom SSI benefits are paid) on certain individuals who would otherwise have that status absent certain benefit increases. And, the appellants explain, SSI status, whether actual or

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separate appeals from one of these later orders and the appellees herein have cross-appealed. These appeals and cross-appeal were stayed by this court pending a decision in the instant case.

deemed, has an automatic effect on Medicaid eligibility only in SSI states, where SSI status is actually determinative of Medicaid eligibility. In 209(b) states, on the other hand, SSI status is not determinative of Medicaid eligibility; 209(b) states determine Medicaid eligibility on the basis of their own income and resources criteria. Even though the appellants make a point to acknowledge that section 12202 does "apply" in all states and thus deems SSI status on eligible individuals in all states, the effect of their interpretation is that protection under the statute actually extends only to eligible individuals in SSI states because only in those states does SSI status have relevance for purposes of Medicaid eligibility.

The district court acknowledged that the appellants offered a "plausible literal meaning of the controlling language," *Darling*, 685 F. Supp. at 1129, but proceeded to reject their theory, believing it to be contrary to Congress's clear intent in section 12202 to give nationwide relief to disabled widow(er)s whose Medicaid entitlement was adversely affected by the 1984 social security increases. Thus, the district court concluded that section 12202 operates in 209(b) states to deem eligible individuals to be receiving no more income than would qualify for SSI benefits. *Id.* at 1131. We agree with the district court.

It is beyond dispute that "[o]ur objective in interpreting a federal statute is to achieve the intent of Congress." *Linquist v. Bowen*, 813 F.2d 884, 888 (8th Cir. 1987). While as a general matter our interpretation must be governed by the statute's plain meaning, it is also a "well-established canon of statutory construction that a court should go beyond the literal language of a statute if reliance on

that language would defeat the plain purpose of the statute * * * *" *Bob Jones University v. United States*, 461 U.S. 574, 586 (1983). We believe that this is a case in which a strict application of the statute's literal language would lead to a result unintended by Congress. In fact, a strict application of the literal language of the statute would defeat the overall purpose for which the statute was enacted (disregard of increase for Medicaid purposes) and result in inequitable and discriminatory treatment in the various states of the Union.

As the district court noted, a narrow focus on the literal language of section 12202 arguably suggests that the statute deems eligible individuals only to be receiving SSI and does not take the next step and deem such individuals to be receiving no more income than would qualify for SSI. However, under this interpretation the clear objective of the statute goes unrealized in 209(b) states. As explained above, SSI status *per se* is not relevant to Medicaid entitlement in 209(b) states. Thus, the end result of the appellants' interpretation is that section 12202 - a statute clearly designed to remove the adverse effects on Medicaid eligibility caused by the 1984 increases - deems a status on eligible persons in SSI states which automatically entitles them to Medicaid and deems the same status on eligible persons in 209(b) states but has no effect on these individuals' Medicaid entitlement. We cannot accept the conclusion that in enacting legislation to remove the adverse effects of the 1984 increases Congress chose to provide full relief only to disabled widow(er)s in SSI states and left such individuals in 209(b) states obligated to pay increased spend-downs in order to receive Medicaid.

Moreover, the appellants' interpretation is inconsistent with the other provisions in the statute requiring that the Secretary provide "each state" with the names of eligible individuals and requiring "each state" to notify affected persons of their right to apply for protection. We find it implausible that if Congress meant to benefit only eligible persons in SSI states, it would enact provisions requiring that eligible persons in "each state" be notified of their right to apply for the statute's protection.

In support of their position, the federal appellants argue that an explanation for Congress's apparent disparate treatment of disabled widow(er)s in SSI states and those in 209(b) states is that in enacting section 12202 Congress was concerned only with the *availability* of Medicaid to individuals receiving increased social security payments. And, the federal appellants explain, after the increases all such persons, whether in a 209(b) or SSI state, are left with some access to Medicaid; SSI state residents receive automatic Medicaid entitlement from "deemed" SSI status and 209(b) state residents can become eligible for Medicaid by spending down to the state standard whether or not the 1984 increases are disregarded.

We have difficulty accepting this argument because even assuming that widow(er)s in 209(b) states can indeed secure Medicaid benefits by spending down, *see* note 3 *infra*, the 1984 increases substantially impair their actual ability to meet the spend-down without foregoing basic necessities of life. It is clear that disabled widow(er)s in 209(b) states suffered adverse effects from the 1984 increases along with SSI state residents, even though 209(b) state residents may not have lost all access

to Medicaid. Those 209(b) state residents who even before the increases had to meet a spend-down before receiving Medicaid became obligated after the increase to meet an even higher spend-down. And, some 209(b) state residents who received Medicaid under the state standard were pushed over the eligiblity level by the 1984 increases and thus had to begin to meet a spend-down before receiving Medicaid. We find it difficult to conclude that Congress would respond to what clearly was a nationwide problem - the negative impact of the increases on Medicaid entitlement - by providing relief to individuals in some states and leaving others similarly situated to suffer the consequences.

The appellants complain that the district court relied upon its view of the underlying purpose of the statute without reference to supportive legislative history or other evidence of congressional intent. We consider the remedial goals of section 12202 to be plain from the face of the statute and also reflected in its brief legislative history. In Senate Report No. 99-146, it is stated:

> The Social Security Amendments of 1983 raised the amount of benefits for disabled widows and widowers aged 50 to 59, effective January 1984. As a result of the increase, some beneficiaries lost eligibility for Supplemental Security Income (SSI) and, consequently, Medicaid. The provision requires that those low-income widows and widowers who lost SSI eligibility because of the January 1984 disability benefit increase may file an application for protection with the State within 15 months after enactment and be deemed to be receiving SSI benefits for the purpose of medicaid eligibility. The provision further directs the Secretary to inform the States of the identities of affected individuals, and States

> to notify such individuals, solicit their applications for medicaid coverage and process their applications promptly.

S. Rep. No. 99-146, 99th Cong., 2d Sess., 1, 331, *reprinted in* 1986 U.S. Code Cong. & Admin. News 42, 296-97.

The appellants seize upon the language in the above-quoted passage providing that "some beneficiaries lost eligibility for [SSI] and, consequently, Medicaid" and argue that it indicates that Congress was concerned only with individuals whose loss of SSI meant automatic loss of Medicaid. We are not convinced. We believe that taken as a whole the above passage, as well as the statute itself, indicates an intent to remove adverse effects on Medicaid that occurred nationwide. Neither the statute nor its legislative history contains any explicit indication that relief was intended to reach only a portion of affected individuals.

While we accept as a general principle the appellants' claim that the courts must defer to an agency's construction of a statute it administers, we are also mindful that in interpreting a statute an agency and the courts must avoid absurd results and deal with internal inconsistencies within a statute. *See United States v. Turkette*, 452 U.S. 576, 580 (1981). In addition, in interpreting a statute we must seek to adopt a construction which gives effect to all its provisions. *See Beef Nebraska, Inc. v. United States*, 807 F.2d 712, 717 (8th Cir. 1986). The interpretation of section 12202 urged by the appellants is one we consider to be unintended by Congress and one which fails to give full meaning to the statute's notice provisions which reflect

Congress's intent that relief should reach all eligible disabled widow(er)s who were adversely affected by the 1984 increases.

III. CONCLUSION

Accordingly, we affirm the district court's decision that the deeming provision in section 12202 deems eligible persons to be receiving no more income than would qualify for SSI as well as its order that the federal appellants withdraw Transmittal No. 1M 86-2 to the extent that it gives 209(b) states an option to completely disregard the 1984 increases referenced in section 12202.

Further, we affirm the district court's order that the time for making application for assistance under section 12202 in 209(b) states shall expire in a reasonable time but no less than six months after eligible disabled widow(er)s in such states have been given appropriate notice of their right to apply for section 12202 protection.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 88-2098/2210-WM

Marietta Darling, etc., et al.,	*	
Appellees,	*	Order Denying Petitions for Rehearing and Suggestions for Rehearing En Banc
vs.	*	
Michael Reagen, Director of the Department of Social Services of the State of Missouri, et al.	*	
Appellant.	*	

Appellants' Michael V. Reagen, Director of the Missouri Department of Social Services and Otis R. Bowen, Secretary of Health and Human Services suggestions for rehearing en banc have been considered by the court and are denied by reasons of the lack of a majority of the active judges voting to rehear the cases en banc.

Petitions for rehearing by the panel are also denied.

September 7, 1989

Order Entered at the Direction of the Court:

/s/ Robert D. St. Vrain
Clerk, United States Court of Appeals, Eighth Circuit.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 88-2098-2210-WM

Marietta Darling, etc., et al.,	*	
Appellees,	*	Appeals from the United States District Court for the Western District of Missouri
vs.	*	
Michael Reagen, Director of the Department of Social Services of the State of Missouri, et al.,	*	
Appellant.	*	

Appellees' motion to remand this case to the district court for reconsideration of attorneys' fees for work on this appeal pursuant to Eighth Circuit Rule 17 (b) is granted. Because this case is a close one and further review may be sought, it may be advisable to delay consideration of appellees' request for attorneys' fees until it is known whether the appellants plan to apply to the Supreme Court for a writ of certiorari, and, if so, whether the writ is granted.

September 18, 1989.

Order Entered at the Direction of the Court:

/s/ Robert D. St. Vrain
Clerk, United States Court of Appeals, Eighth Circuit.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
ST. JOSEPH DIVISION

MARIETTA DARLING, et al., Plaintiffs,	)	No. 87-6067-CV-SJ-6
v.	)	
OTIS R. BOWEN, M.D., Secretary of Health and Human Services, et al., Defendants.	)	(Filed May 12, 1988)

MEMORANDUM AND ORDER

Plaintiff Darling, a widow of a Social Security covered wage-earner, has special income entitlement as a disabled widow, by reason of her considerable medical disabilities. Defendants are the Secretary of the Department of Health and Human Services (Secretary), the Health Care Financing Administration (HCFA, a branch of HHS), and the Director of the Department of Social Services of the State of Missouri (Director). At issue on cross-motions for summary judgment is the Medicaid entitlement of plaintiff and others similarly situated which has been placed in question by reason of Congressional action increasing in 1984 the Federal payments to her as a disabled widow (and creating periodic cost of living increases). Congress subsequently provided in 1986 that such increases should not be counted, for Medicaid entitlement purposes, as a factor disqualifying a person from receiving Supplemental Security Income (SSI) even though in fact the increases do push a recipient over the

level for entitlement to such low income payments. The disabled widow(er)s[1] are "deemed" to have SSI benefits for Medicaid purposes if they would be SSI eligible without the increase. Congress required, however, that a Medicaid claimant make application for protection of his or her Medicaid entitlement. 42 U.S.C. § 1383c(b) (1) and (3) (§ 12202(a) of Pub.L. 99-272), the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA)). The parties dispute whether the COBRA relief was comprehensive and nationwide. No material facts are in dispute.

Plaintiff contends that Congress must have intended that the income increases provided by it be disregarded nationwide in administering the Medicaid programs, as demonstrated by the requirement that *each* state be notified of the names of affected individuals and the further requirement that *each* state promptly notify all individuals who may qualify for medical assistance under a state Medicaid plan of their right to make application for such assistance. Section 12202(b) of Pub.L. 99-272. Congress also described plaintiff and others similarly situated as "eligible" persons under the corrective law. 42 U.S.C. § 1383c(b) (2).

Defendants contend that Congress did not offer nationwide protection from the adverse Medicaid effects of its increases in the Federal payments to disabled widow(er)s because the protection only relates to Medicaid entitlement triggered by SSI entitlement. Fourteen states, including Missouri, have opted out of using SSI

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[1] As a practical matter the claimants are almost exclusively widows, although a few widowers are in the program.

entitlement as such as a triggering factor for Medicaid, and have their own plans, approved by Federal officials, for Medicaid entitlement. Treating Medicaid claimants as though they had SSI entitlement makes no difference in such states, according to defendants. The states with their own Medicaid entitlement plans, unrelated specifically to SSI entitlement, are known as "209(b)" states. *See Savage v. Toan*, 795 F.2d 643 (8th Cir. 1986), cases cited therein, and 42 U.S.C. § 1396a(f).

I.

The first issue presented is class certification. Relief having been granted for Illinois residents in a companion case that will be discussed, plaintiff seeks certification of a class of eligible disabled widows and widowers (defined in 42 U.S.C. § 1383c(b) (2)) who reside in Missouri and the twelve other 209(b) states (omitting Illinois) who have been or may be harmed in determining Medicaid eligibility by the Secretary's position, previously transmitted to such states, that the 209(b) states have the option but not the duty to disregard the pertinent increases in Social Security benefits. She seeks subclass certification for Missouri residents in such status. The eligible Missourians may have a special claim to relief in that while SSI *entitlement* as such is not a factor in determining benefits under the Missouri Medicaid plan, SSI entitlement *income* is the controlling income factor under that plan.[2] Another subclass, included within the former

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[2] Missouri's classification as a 209(b) state rather than an SSI state is derived from its retaining and exercising the right

(Continued on following page)

category and including the latter, would be such eligible disabled widowed persons who are residents of Missouri and all other 209(b) states that use SSI entitlement income as the controlling income factor under their Medicaid plans.[3]

Procedurally this case bears resemblance to *Linquist v. Bowen*, 633 F.Supp. 846 (W.D. Mo. 1986), *affirmed*, 813 F.2d 884 (8th Cir. 1987), where Judge Bartlett created a nationwide class of Social Security claimants in litigation in which counsel for this plaintiff served as counsel. Rule 23(b) (2) certification is deemed appropriate here, as in that case. Adequacy of representation is the same; moreover, the court is favorably impressed by the quality of work already done in this case, and by oral argument. Plaintiff's claim is typical of the claims that she wishes to present. Common questions of law control the rights of all persons in the class, even though state plans may vary

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(Continued from previous page)

to have a category of eligibility as to the permissible assets (resources) of Medicaid recipients that is more restrictive than SSI eligibility as to resources. Missouri has elected not to use a lower income standard than that required for the Federal SSI program.

[3] The court does not find such a list of states in the filings in this case or in the briefing. A general descriptive classification may serve current purposes, however, and any indefiniteness can doubtless be cured prior to formulating any final order that may be authorized.

in 209(b) states. The question presented focuses on Federal rather than state law, although the impact of the court's ruling may vary.

Defendants argue that there is a defect in parties for a multi-state class, in that only the Missouri state agency is before the court (in addition to Federal defendants). The same procedure was used, however, in *Lynch v. Rank*, 604 F.Supp. 30 (N.D. Cal. 1984), *affirmed*, 747 F.2d 528 (9th Cir. 1984). The basic contention is that the Secretary has misconstrued Congressional action and has supplied unsound direction to the 209(b) states. As in *Lynch v. Rank*, this appears to be a problem that can be dealt with in the absence of representation from each state.

There are approximately 950 eligible widows and widowers in 209(b) states (other than Illinois) who receive the disabled widow payments and who have lost SSI entitlement. Some 127 such persons live in Missouri, and about 578 live in seven states that have opted not to protect them from the adverse Medicaid effects of the increased Federal payments in question.[4] These numbers are all more than adequate to satisfy the numerosity requirement for class treatment under Rule 23(a) (1), F. R. Civ. Proc. It would certainly not be feasible to require joinder of each affected individual. Even if only 30 or 40

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[4] The pertinent seven states are Indiana, Missouri, Nebraska, New Hampshire, North Dakota, Ohio and Utah. Three of these states are in the Eighth Circuit. Illinois, as noted, has been ordered to give the protection here sought, and Connecticut, Hawaii, Minnesota, North Carolina, Oklahoma and Virginia elected to give protection, after being advised by the Secretary that they had the option to do so.

persons were involved, considering the fact that they are geographically scattered, physically disabled, elderly and impoverished and doubtless in many instances lacking skills in literacy and understanding of the complex legal issues presented, and considering further that speedy determination of their rights is much to be desired, a class would be certified. Under the circumstances of this case I believe I have complied with the admonition that I "take care" to ensure that multi-state treatment is appropriate. *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979).[5] The above described class and two subclasses will be certified.

II.

Turning to the merits of the pending cross-motions for summary judgment, the reader needs familiarity with the so-called 209(b) option, allowing states to develop Medicaid plans that are not automatically dependent on a recipient's SSI entitlement. *See Schweiker v. Gray Panthers*, 453 U.S. 34, 38-9 (1981). The details of the increased

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[5] There is indeed authority to the effect that class certification is not necessary because I would have the option to grant injunctive relief effectively benefitting a considerable class simply by omitting to artificially restrict relief to a named plaintiff. *Ihrke v. Northern States Power Company*, 459 F.2d 566 (8th Cir. 1972), *judgment vacated on other grounds*, 409 U.S. 815 (1972); *Collins v. Marshall*, 507 F.Supp. 83 (W.D. Mo. 1981), *rev'd. on other grounds*, 661 F.2d 705. Where, as here, the parties are prepared to deal with the class action question, and the question can be timely ruled, more cautious treatment is probably desirable.

benefits authorized in 1983 for the special class of beneficiaries of disabled widow(er)'s benefits need not be elaborated. Such increases occurred in January 1984. The additional payments so authorized, together with future cost of living increases, served to disqualify some of the recipients from SSI entitlement. In most of the states, this automatically deprived the group of Medicaid, absent a "spend-down" for medical purposes to the level of SSI entitlement. The "spend-down" terminology is similar to more familiar "deductibles" in the insurance loss context. Because we are dealing with deeply impoverished persons (the SSI entitlement level being $336 per month in 1986 and $340 per month in 1987) any significant spend-down requirement tends to cause abandonment of needed medication and medical treatment or forces needy persons to rely on private charity.

Some years ago a similar adverse Medicaid effect of an increase in Social Security payments was corrected by legislation known as the Pickle Amendment. Litigation in California, an SSI state, resulted in a construction favoring the recipients. *Lynch v. Rank supra,* 604 F.Supp. 30.

Congress sought in 1986 to correct the adverse effect of the 1984 Social Security increases for the group in question. 42 U.S.C. § 1383c, Pub.L. 99-272, § 12202(a) and (b). Without reciting all the difficult phrasing and cross-referencing in this legislation, an attempt will be made to summarize noncontroversial portions and to quote the few pertinent words that are in controversy. Medicaid entitlement relief was to be offered to each "eligible widow or widower," defined as persons who were entitled to the disabled widow(er)'s benefits and who lost SSI entitlement because of the increases in such benefits in

1984. 42 U.S.C. § 1383c(b) (2). Such eligible widow(er)s "shall be deemed" for Medicaid purposes to be individuals "with respect to whom (SSI) benefits . . . are paid . . ." if they have made timely application for protection, remain eligible for the disabled widow (her)'s benefits and "would be eligible for (SSI) benefits" if the pertinent increases in widow(er)'s benefits "were disregarded." 42 U.S.C. § 1383c(b) (1) and (3).

The Secretary was directed to supply to each state the names of persons classified as disabled widow(er)s under the Social Security program who might be eligible for Medicaid relief and each state was required to "promptly notify" such persons of their right to make application for such assistance. Sec. 12202(b) of Pub.L. 99-272, appended to 42 U.S.C.A. § 1383c. While this wording is not entirely consistent with the terms used in § 12202(a), it apparently means that the Secretary and the states were required to notify and assist all designated "eligible" persons who might need to make a "written application for protection" under the remedial legislation.

A fifteen month period was initially allowed for seeking protection; this period has been extended for twelve additional months and will expire on July 1, 1988. If the court should conclude that appropriate notices have not been given by the Secretary or the states, however, counsel for the Federal defendants advised at oral argument of the pending summary judgment motions that they would consider that the July 1, 1988, deadline was not binding, in the absence of the prompt notification required by the statute. While this would undoubtedly be true of the initial fifteen month period that was joined by Congress

with the prompt notification requirement, it seems arguable that the subsequent twelve month extension was intended to be final. The interpretation given by the Federal authorities to the actions of Congress will be accepted, however.

By Transmittal No. IM 86-2 in July 1986, HCFA notified the states that lists of names of affected individuals would be supplied, implementing § 12202 of the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA). The states were advised that

> Section 12202 provides for the preservation of categorical Medicaid eligibility for those disabled widows and widowers whose disabled widow's and widower's benefits were increased as a result of the elimination of the reduction factor required by Section 134 of P.L. 98-21, and who would be eligible for Supplemental Security Income (SSI) and/or optional State supplement (SSP) had there not been the elimination of the reduction factor and subsequent cost of living adjustments.

Doc. 37, p. 76. The transmittal contained a section specifically directed to eligibility in 209(b) states which provides that

> because eligibility for SSI/SSP benefits does not necessarily guarantee eligibility for Medicaid in a 209(b) State, such States may not be required to provide Medicaid to individuals solely because they meet these criteria. Assuming the individual meets all [other] criteria, the State may elect to disregard all or any part of the amount by which the individual's benefit increased, as well as subsequent cost-of-living (COLA) increases, in determining whether he or

> she is eligible for Medicaid as categorically needy.

Doc. 37, p. 80. This directive by HCFA is the immediate source of the present controversy. As indicated, seven states, including Missouri, have accepted the option offered by HCFA not to disregard the increased widow(er)'s benefits in determining Medicaid eligibility.

Plaintiff Darling's affidavit (to which the Director takes minor exception, but which will be treated as illustrative) recites that her disabled widow's benefit increased in 1984 from $277 per month to $389.60 per month. SSI benefits, amounting to $57 per month, were terminated as a result of her increased income. Because her income passed the figure for eligibility for Medicaid, she must now "spend down" $192 per *quarter* before being eligible for such assistance.[6] She estimates the cost of prescription medications and treatments, which she now cannot afford to purchase, at $196 per *month*. Ms. Darling is 63 years old, a widow, with numerous serious physical problems.

The central question of interpretation is whether, when Congress provided for a disregard of the eligible disabled widow(er)'s increases in benefits, so that such person should be "deemed" for Medicaid purposes to be a person to whom SSI "benefits . . . are paid" it meant (1) simply to benefit such widows and widowers in SSI

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[6] The Federal defendants, at oral argument, supplied another example of the problem, noting that plaintiff's monthly income is now $421 and contending that her spend-down requirement is $67 monthly or $201 quarterly.

states, where SSI benefits automatically result in Medicaid entitlement or (2) to benefit eligible widows and widowers in all states, by requiring that they be "deemed" to be receiving *income qualifying for SSI benefits*. If the latter interpretation is used, disregarding the increased income in question, widows and widowers in 209(b) states like Missouri that use the same income qualifier as is used for SSI would be fully entitled to Medicaid as though they were living in SSI states. Widows and widowers in 209(b) states that may have a Medicaid plan with a lower income cut-off than the SSI income level would be partially benefitted by the latter interpretation, in that their spend-down requirements would be from the SSI income level rather than from the higher level that the increased payments actually achieve.

It is my conclusion that defendants offer a more plausible literal meaning of the controlling language but that plaintiff offers a much more plausible statement of Congressional intent, given the full context of § 12202 and the absence of any reasonable basis for Congress to discriminate in favor of widows and widowers in SSI states. While the "words used do not formally quite match" my reading of Congressional intent, I conclude that I should not "wince at carrying out that purpose." To accept defendants' contention would be to demonstrate "over solicitude for the letter" of the statute. *Federal Deposit Ins. Corp. v. Tremaine*, 133 F.2d 827, 830 (2d Cir. 1943) (L. Hand, C.J.).[7]

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[7] Judge Hand's principles for statutory construction are repeated in *District 2 Marine Engineers Beneficial Ass'n. v. Grand*

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Defendants principally rely on a "plain meaning" theory of the language of the pertinent statutes and the structure of the various programs. They cite a closely parallel situation where Congress in 1980 sought to protect Medicaid eligibility for persons whose earned income made them ineligible for SSI benefits. Congress initially simply provided that such earned income should not be deemed, for Medicaid purposes, a disqualifier for SSI benefits. When it was contended that the protection was inadequate, because it did not apply to 209(b) states, Congress in 1986 specifically provided that the earned income not disqualify Medicaid claimants in such states. 42 U.S.C. § 1382h(b) (3). *See* 1986 USCCAN 6096 (Senate Report).

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Bassa Tankers, Inc., 663 F.2d 392, 395 (2d Cir. 1981) (Mansfield, J.), and were nicely reformulated by Judge Friendly in *J.C. Penney Co. v. Commissioner of Internal Revenue*, 312 F.2d 65, 68 (2d Cir. 1962). It is possible that Eighth Circuit language is generally a bit less bold. *E.g., Grand Laboratories, Inc. v. Harris*, 660 F.2d 1288, 1292 (8th Cir. 1981) (Arnold, J.), *cert. denied*, 456 U.S. 927 (1982). It is unlikely, however, that Eighth Circuit precedent is distinctly more literal-minded than precedents elsewhere. As Judge Stephenson wrote, "it remains the judicial function to give legislation its intended effect." *Hodgson v. Board of County Commissioners*, 614 F.2d 601, 614 (8th Cir. 1980). *See also, Heckler v. Edwards*, 465 U.S. 870, 879 (1984), rejecting "surface literal meaning," and *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 221, 230-1 (1986), rejecting an incongruous "first blush" reading in favor of evaluation of the statutory language "as a whole" and the underlying Congressional purpose. I accept the fact that judges should not dramatically rewrite statutes, but they may straighten out a garbled statement when the words do not "formally quite match" legislative purpose. That is what I find here.

Plaintiffs make their own argument from the language of the existing statutes and further rely on a ruling by District Judge Beatty in *Hill v. Duffy*, No. 87-5208 (S.D. Ill. July 31, 1987), CCH Medicare & Medicaid Guide, ¶36,817 at p. 16,100. In that case, Judge Beatty relied heavily on the requirement of notice in *all* states to conclude that Congress must have intended that no Medicaid claimant in any state should be penalized by reason of the income enhancing provisions granted to disabled widow(er)s. He also relied on the terms of the Illinois plan, under which Medicaid entitlement was linked to State Supplemental Payments (SSP) eligibility. The Federal law requires that SSP recipients be "deemed" to be such recipients even when they actually lose such payments by reason of the Federal payments that began in 1984.

On the question of likely Congressional intent, it is extremely difficult to disagree with plaintiff. The only imaginable policy argument against uniform treatment of the Federal funds newly offered to Medicaid recipients is a federalism contention that, consistent with 209(b), all states should have an option to be less generous in setting qualifications than the national standard. This conceivable theory lacks substance or plausibility in the present context and is not developed by defendants. The hand that offered additional funds simply restricted the adverse side-effects of funds. No persons were entitled to Medicaid who had not already been qualified by the state plans. No additional financial burden was placed on the states. It was unnecessary to reinforce the 209(b) option, because there was no realistic likelihood that states would withdraw from Medicaid simply because a small

group of disabled widows would be kept on the Medicaid rolls, as originally *allowed* by the states.

The Congress that acted to preserve the rights of Medicaid claimants in 209(b) states when the earned income issue was dealt with in 1986 can hardly have intended to give disabled widow(er)s less favorable treatment. In fact it defined plaintiff and her class as "eligible" for the relief granted. 42 U.S.C. § 1383c(b) (2). This indicates an unmistakable purpose to give nationwide relief, paralleling the requirement of notifications in all states. The question remains, however, whether any language adopted by Congress allows judicial relief.

One of defendants' most appealing contentions, if sound, is that Congress could easily have said what plaintiff contends it meant, and instead used a complex form of words seeming to retain the link between SSI benefits as such and Medicaid entitlement. The corrective language chosen in the earned income context, however, was by no means simple. 42 U.S.C. § 1382h(b)(3).

Another contention of defendants is that the courts should defer to an administrative reading of the statute. But I must follow what I believe to be "clear Congressional intent" when there is conflict between such intent and administrative construction. *Immigration and Naturalization Service v. Cardoza Fonseca*, 107 S.Ct. 1207, 1221 (1987). In this case, moreover, HCFA has waffled. The option to disregard the increased income suggests HCFA thought Congress intended such a result; otherwise, HCFA is offering to spend Federal funds for additional Medicaid in 209(b) states without authority. The option to include the new income and disregard the legislation

apparently means that HCFA, like this court, recognized that the words chosen by Congress literally point in that direction. In effect, HCFA chose to give the 209(b) states the option to follow Congressional intent or the Congressional language. It becomes a judicial duty to resolve the question, not to straddle it.

I am assisted by the previously cited ruling of Judge Beatty. He ordered the State of Illinois to disregard the increased disabled widow(er) benefits because, although that state was a 209(b) state, its plan for Medicaid guaranteed eligibility when a person was eligible for SSP (State Supplemental Payments). The rule in Missouri is that "If a single individual has an adjusted gross income of the current SSI maximum per month or less and meets the other eligibility requirements, he will be eligible for Medical Assistance." 13 CSR 40-2.200(2). Thus the Missouri situation is parallel to that in Illinois, except that the Missouri income level that qualifies for Medicaid matches the SSI income level while the Illinois income level that qualifies for Medicaid matches the SSP income level in that state. While neither Ms. Darling nor the Illinois plaintiff was actually receiving SSI or SSP after the increases pushed them past the eligibility level, Congress mandated that they be "deemed" to be receiving such benefits. *If "deemed" to be receiving those benefits, it seems they should be "deemed" to be receiving no more income than would qualify for such benefits.* All conditions of receiving such benefits may fairly be included in the concept that the widow(er)s should be deemed to be receiving the benefits. To say that the widow(er)s are deemed to be receiving the benefits but are not deemed to be qualified for the benefits is arguable but strained, and surely not

the probable intent of a Congress which directed that *all* affected persons in *every* state should be notified of the relief being granted to them, as "eligible" persons.

The appropriate relief extends beyond Missouri and other states where the qualifying income level is the *same* for Medicaid as for SSI. If eligible Missouri recipients are "deemed" to have no more income than would qualify for SSI then there is no reason to conclude that other eligible persons in other states are deemed to have a higher *income* than the SSI qualifying amount. Thus, the higher incomes created by the 1984 increases should be disregarded for eligible disabled widows and widowers in all states. While this will not qualify persons for Medicaid in all states, it at least reduces the necessary spend-down. It is therefore

ORDERED that three classes be certified, as set forth above, and that summary judgment be entered in favor of plaintiff and against defendants. It is further

ORDERED that Federal defendants promptly withdraw Transmittal No. IM 86-2, insofar as it purports to give an option to 209(b) states to disregard the relief mandated by § 12202 of COBRA, and promptly notify the 209(b) states that they must tender the full relief mandated by § 12202 of COBRA. It is further

ORDERED that the time for making application for relief in 209(b) states shall not expire July 1, 1988, but shall expire in a reasonable time (no less than six months) after eligible disabled widows and widowers in such states have been given appropriate notice of their right to file written applications for protection. It is further

ORDERED that the parties confer and present to the court for its approval within thirty (30) days of this date appropriate forms of notice from HCFA and from the 209(b) states to carry out the orders herein. It is further

ORDERED that jurisdiction be retained to modify or clarify these orders.

/s/ Howard F. Sachs
HOWARD F. SACHS
UNITED STATES DISTRICT JUDGE

DATED: May 12, 1988.

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
ST. JOSEPH DIVISION

MARIETTA DARLING, et al., Plaintiffs, v. OTIS R. BOWEN, M.D., Secretary of Health and Human Services, et al., Defendants.	)	No. 87-6067-CV-SJ-6 (Filed Sep. 6, 1988)

MEMORANDUM AND ORDER

On May 12, 1988, the court ruled in favor of plaintiffs' version of the applicable law and, among other things, ordered the Federal defendants to promptly withdraw information to the contrary given to the State Agencies. As one means to carry out the order, the court also ordered the parties to confer and present for approval within 30 days appropriate forms of notice from the Federal agency and from the pertinent State agencies. While an appeal was anticipated from the order to give prompt notice the court reserved jurisdiction to modify or clarify the various rulings.

The parties have been unable to agree on forms of notice and have in fact gone off in different directions. Plaintiffs have proposed notice forms which go beyond the opinion of May 12 in several respects including: (1) allowing one year for making application for relief instead of six months, and (2) enlarging relief to prevent *any* adverse Medicaid effect from the increased payments in question. Plaintiffs have also proposed some formal

provisions in the notices that the governmental agencies oppose.

The Missouri defendants have proposed a form of notice to potential Medicaid recipients but have not joined in any proposal for a notice from the Federal defendants.

The Federal defendants request a stay of all proceedings pending appeal, and fail to offer any form of interim notice.

The court has decided, in essence, to deny all requests, none of which is consistent with the May 12 ruling. On the substantive matter, the court continues to believe that six months actual notice should suffice. While acknowledging that Congressional intent may loosely be characterized as attempting to prevent any adverse Medicaid effect from the increased payments to certain disabled widow(er)s, the legislative language clearly links the protection to qualifications for SSI (and SSP). The court concludes it would be indulging an inappropriate function if it should "dramatically re-write" the statute by simply eliminating all reference to such low-income eligibility.[1] Using income eligibility instead of

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[1] As a clarification or modification of the prior ruling, it does seem that in any State with SSP eligibility differing from the SSI eligibility, the rationale of the May 12 ruling would require that the base used be the more advantageous (to claimant) of the two forms of eligibility. This appears to conform to the statutory pattern. *See* 42 U.S.C. § 1383c(b) (4) and 42 U.S.C. § 1382e, as illustrated by the ruling in *Hill v. Duffy*, No. 87-5208 (S.D. Ill. July 31, 1987). Previously discussed.

literal benefits as the test seems to carry out legislative intent to the extent judicially feasible, in that *benefits* must imply income *eligibility*, a concept which helps plaintiffs. A total disregard of SSI and SSP standards strikes me as requiring some legislative language as a tool to achieve what may well be the general legislative intent.

Because there is a pending appeal, if notices actually reach claimants in October or November it is doubtful that any stay would result in major funding losses by the States or the Federal Government prior to any appellate ruling. It will be acknowledged that a notice that is retracted may be confusing and disappointing; however, the greater evil would be to the failure to give notice and thereby cause hardship and probable loss of funds to impoverished persons. The State argues persuasively that retroactive relief may conflict with the Eleventh Amendment, as construed, at least insofar as State funding would be required.[2] This increases the urgency of at least beginning to offer relief pending appeal

It is therefore ORDERED:

1. The Federal defendants' motion to stay is DENIED.

2. Plaintiffs' request to grant a full year's actual notice is DENIED.

3. Plaintiffs' request to notify claimants that the increase in widow(er)s' benefits should be totally disregarded, irrespective of SSI and SSP qualifying income levels is DENIED.

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[2] It is more plausible that at least partial retroactivity should occur, to the extent Federal funding is involved.

4. Plaintiffs' proposed notice forms are DISAPPROVED (without prejudice to voluntary use of portions of those forms by the Federal defendants).

5. The notice forms shall contain notice that SSP income eligibility shall be considered, consistent with this opinion, unless deleted with consent of plaintiffs as being legally unsound or too debatable for summary ruling.

6. The Federal defendants shall devise their own notice forms, to be transmitted to State agencies on or before October 15, 1988, with directions to notify prospective claimants on suggested State agency forms on or before November 15, 1988.

7. Progress reports shall be given to plaintiffs by the Federal defendants every three months.

8. Pending further order of this court or the court of appeals, the notice forms shall neither promise nor preclude full retroactive reimbursement.

/s/ Howard F. Sachs
HOWARD F. SACHS
UNITED STATES DISTRICT JUDGE

DATED: Sept. 6, 1988.

APPENDIX C

SECTION 12202 of the Consolidated Omnibus Budget Reconciliation Act of 1986 (42 U.S.C. §1383c (b)

SEC. 12202. PRESERVATION OF BENEFIT STATUS FOR DISABLED WIDOWS AND WIDOWERS WHO LOST SSI BENEFITS BECAUSE OF 1983 CHANGES IN ACTUARIAL REDUCTION FORMULA.

(a) IN GENERAL. – Section 1634 of the Social Security Act is amended –

(1) by inserting "(a)" after "SEC. 1634.", and

(2) by adding at the end the following new subsection:

"(b)(1) An eligible disabled widow or widower (described in paragraph (2)) who is entitled to a widow's or widower's insurance benefit based on a disability for any month under section 202 (e) or (f) but is not eligible for benefits under this title in that month, and who applies for the protection of this subsection under paragraph (3), shall be deemed for purposes of title XIX to be an individual with respect to whom benefits under this title are paid in that month if he or she –

"(A) has been continuously entitled to such widow's or widower's insurance benefits from the first month for which the increase described in paragraph (2)(C) was reflected in such benefits through the month involved, and

"(B) would be eligible for benefits under this title in the month involved if the amount of the increase described in paragraph (2)(C) in his or her

widow's or widower's insurance benefits, and any subsequent cost-of-living adjustments in such benefits under section 215(i), were disregarded.

"(2) For purposes of paragraph (1), the term 'eligible disabled widow or widower' means an individual who –

"(A) was entitled to a monthly insurance benefit under title II for December 1983.

"(B) was entitled to a widow's or widower's insurance benefit based on a disability under section 202 (e) or (f) for January 1984 and with respect to whom a benefit under this title was paid in that month, and

"(C) because of the increase in the amount of his or her widow's or widower's insurance benefits which resulted from the amendments made by section 134 of the Social Security Amendments of 1983 (Public Law 98-21) (eliminating the additional reduction factor for disabled widows and widowers under age 60), was ineligible for benefits under this title in the first month in which such increase was paid to him or her (and in which a retroactive payment of such increase for prior months was not made).

"(3) This subsection shall only apply to an individual who files a written application for protection under this subsection, in such manner and form as the Secretary may prescribe, during the 15-month period beginning with the month in which this subsection is enacted.

"(4) For purposes of this subsection, the term 'benefits under this title' includes payments of the type

described in section 1616(a) or of the type described in section 212(a) of Public Law 93-66.".

(b) IDENTIFICATION OF BENEFICIARIES. – (1) As soon as possible after the date of the enactment of this Act, the Secretary of Health and Human Services shall provide each State with the names of all individuals receiving widow's or widower's insurance benefits under subsection (e) or (f) of section 202 of the Social Security Act based on a disability who might qualify for medical assistance under the plan of that State approved under title XIX of such Act by reason of the application of section 1634(b) of the Social Security Act.

(2) Each State shall –

(A) using the information so provided and any other information it may have, promptly notify all individuals who may qualify for medical assistance under its plan by reason of such section 1634(b) or their right to make application for such assistance,

(B) solicit their applications for such assistance, and

(C) make the necessary determination of such individuals' eligibility for such assistance under such section and under such title XIX.

(c) EFFECTIVE DATE. – The amendment made by subsection (a)(2) shall not have the effect of deeming an individual eligible for medical assistance for any month which begins less than two months after the date of the enactment of this Act.

42 USC §1396a(f)

(f) Effective date of State plan as determinative of duty of State to provide medical assistance to aged, blind, or disabled individuals

Notwithstanding any other provision of this subchapter, except, as provided in subsection (e) of this section and section 1382h(b)(3) of this title, no State not eligible to participate in the State plan program established under subchapter XVI of this chapter shall be required to provide medical assistance to any aged, blind, or disabled individual (within the meaning of subchapter XVI of this chapter) for any month unless such State would be (or would have been) required to provide medical assistance to such individual for such month had its plan for medical assistance approved under this subchapter and in effect on January 1, 1972, been in effect in such month, except that for this purpose any such individual shall be deemed eligible for medical assistance under such State plan if (in addition to meeting such other requirements as are or may be imposed under the State plan) the income of any such individual as determined in accordance with section 1396b(f) of this title (after deducting any supplemental security income payment and State supplementary payment made with respect to such individual, and incurred expenses for medical care as recognized under State law regardless of whether such expenses are reimbursed under another public program of the State or political subdivision thereof) is not in excess of the standard for medical assistance established under the State plan as in effect on January 1, 1972. In

States which provide medical assistance to individuals pursuant to paragraph (10)(C) of subsection (a) of this section, an individual who is eligible for medical assistance by reason of the requirements of this section concerning the deduction of incurred medical expenses from income shall be considered an individual eligible for medical assistance under paragraph (10)(A) of that subsection if that individual is, or is eligible to be (1) an individual with respect to whom there is payable a State supplementary payment on the basis of which similarly situated individuals are eligible to receive medical assistance equal in amount, duration, and scope to that provided to individuals eligible under paragraph (10)(A), or (2) an eligible individual or eligible spouse, as defined in subchapter XVI of this chapter, with respect to whom supplemental security income benefits are payable; otherwise that individual shall be considered to be an individual eligible for medical assistance under paragraph (10)(C) of that subsection. In States which do not provide medical assistance to individuals pursuant to paragraph (10)(C) of that subsection, an individual who is eligible for medical assistance by reason of the requirements of this section concerning the deduction of incurred medical expenses from income shall be considered an individual eligible for medical assistance under paragraph (10)(A) of that subsection.

APPENDIX D

state medicaid manual **Part 3 – Eligibility**	Department of Health and Human Services Health Care Financing Administration

Transmittal No. IM 86-2	Date July 1986

REVISED MATERIAL	*REVISED PAGES*	*REPLACED PAGE*
State Medicaid Manual, Table of Contents for Intermin Manual Instructions	1 p.	1 p.
Table of Contents, Part 3	1 p.	1 p.
Sec. IM 3448	3 pp.	–
Sec. IM 3910	1 p.	–

FILE AT THE END OF PART 3

NEW POLICY – EFFECTIVE DATE: July 1, 1986.

Section IM 3448, Preservation of Medicaid Benefit Status for Disabled Widows and Widowers Who Lost SSI Benefits Because of 1983 Changes in Actuarial Reduction Formula. – This instruction implements §12202 of the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA). Section 12202 provides for the preservation of categorical Medicaid eligibility for those disabled widows and widowers whose disabled widow's and widower's benefits were increased as a result of the elimination of the reduction factor required by section 134 of P.L. 98-21, and who

would be eligible for Supplemental Security Income (SSI) and/or an optional State supplement (SSP) had there not been the elimination of the reduction factor and subsequent cost of living adjustments.

To assist States in implementing this section of COBRA, the Social Security Administration (SSA) is preparing computer tapes for each State listing potentially affected individuals and providing other pertinent information. Specific instructions concerning the format, content, and use of these tapes will follow in a separate interim instruction. HCFA will forward the computer tapes to the States as soon as they are available.

Section IM 3910, Applicant and Recipient Cooperation. – Implements section 9503(e) of the Consolidated Omnibus Budget Reconciliation Act of 1985 (P.L. 99-272). Section 9503(e) adds a new subparagraph (C) to section 1912(a)(1) of the Social Security Act to provide, as a Medicaid State plan requirement, that individuals, as a condition of eligibility for medical assistance, be required to cooperate with the State in identifying, and providing information to assist the State in pursuing, any third party who may be liable to pay for care and services available under the plan. This requirement is in addition to the requirements (see §3905) that an individual assign his rights to benefits and cooperate in establishing paternity and in obtaining medical support and payments as a condition of eligibility.

THIS WILL BE INTEGRATED INTO THE MANUAL TEXT AT A FUTURE DATE.

INTERIM STATE MEDICAID MANUAL INSTRUCTIONS
86-2

Section IM 3448

IM 3448. *PRESERVATION OF MEDICAID BENEFIT STATUS FOR DISABLED WIDOWS AND WIDOWERS WHO LOST SSI BENEFITS BECAUSE OF 1983 CHANGES IN ACTUARIAL REDUCTION FORMULA*

Prior to the enactment of section 134 of P.L. 98-21 (the Social Security Amendments of 1983) disabled widows and widowers who became entitled to benefits between the ages of 50 and 59 had their disabled widow's and widower's insurance benefits reduced below the amount received by older disabled widows and widowers by an actuarial formula. However, section 134 of P.L. 98-21 eliminated this additional reduction factor, resulting in the benefits of these widows and widowers being increased. For some widows and widowers who had also been receiving Supplemental Security Income (SSI) benefits or an optional State supplement (SSP), the increase in their benefits was enough to raise their incomes above the SSI/SSP benefit rate, thus causing the loss of SSI/SSP and with it the loss of eligibility for Medicaid as categorically needy individuals. The Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) (P.L. No. 99-272, section 12202) amended section 1634 of the Social Security Act, restoring categorically needy Medicaid eligibility for those individuals who apply within the prescribed period.

IM 3448.1 *Eligibility – Non-209(b) States.* – Non-209(b) States must provide Medicaid as categorically needy to any disabled widow or widower who for any month is entitled to a widow's or widower's benefit under section 202(e) or (f) of the Social Security Act, but is not eligible for SSI/SSP benefits, if he or she

1. was entitled to a monthly insurance benefit under title II of the Social Security Act for December 1983;

2. was entitled to and received a widow's or widower's benefit based on a disability under section 202(e) or (f) of the Social Security Act for January 1984;

3. because of the increase in the amount of his or her widow's or widower's benefit which resulted from the elimination of the reduction factor for disabled widows and widowers entitled before age 60 became ineligible for SSI/SSP in the first month in which that increase was paid to him or her (and in which a retroactive payment of that increase for prior months was not made);

4. has been continuously entitled to a widow's or widower's benefit under section 202(e) or (f) of the Act from the first month that increase in his or her widow's or widower's benefit was received; and

5. would be eligible for SSI/SSP benefits if the amount of that increase, and any subsequent cost-of-living adjustments in widow's or widower's benefits provided under section 215(i) of the Act, were disregarded.

IM 3448.2 *Eligibility – 209(b) States.* – States which exercise their option to use more restrictive eligibility criteria than are used by the SSI program must also apply the

eligibility criteria described in section 3448.1 to determine whether individuals qualify for categorical Medicaid under section 12202 of COBRA. However, because eligibility for SSI/SSP benefits does not necessarily guarantee eligibility for Medicaid in a 209(b) State, such States may not be required to provide Medicaid to individuals solely because they meet these criteria. Assuming the individual meets all of these section 3448.1 criteria, the State may elect to disregard all or any part of the amount by which the individual's benefit increased, as well as subsequent cost-of-living (COLA) increases, in determining whether he or she is eligible for Medicaid as categorically needy.

IM 3448.3 *Written Application and Effective Date.* – Individuals who may be eligible for categorical Medicaid under section 12202 of COBRA must file a written application for Medicaid (see 42 CFR 435.907 for requirements for written applications) under this section *before* July 1, 1987. If an individual does not file a written application before that date, he or she cannot be eligible for Medicaid under this section.

Eligibility for categorical Medicaid under section 12202 of COBRA is effective no earlier than July 1, 1986.

IM 3448.4 *Notification of Potentially Eligible Individuals.* – States are required by the law to separately notify each individual who may meet the requirements for eligibility for categorical Medicaid under section 12202 of COBRA of his or her potential eligibility, and invite each individual to file an application for benefits. States which are 209(b) States are required to notify individuals in accordance with this section regardless of the method they use to determine an individual's eligibility. To assist the

States in identifying potentially eligible individuals, HCFA will provide to each State a computer tape prepared by the Social Security Administration (SSA) listing the individuals in each State who may meet the requirements in items 1 through 4 of section 3448.1 of this instruction, together with a current address and other pertinent information for each individual. HCFA will mail the tapes to the States on or about August 1, 1986. No later than 30 days following receipt of its tape, each State must notify potentially affected individuals of the possibility that they may be eligible for categorical Medicaid.

IM 3448.5 *Content of Notices.* – States may prepare their own notices. However, all notices must meet the following requirements:

1. States must separately notify each potentially eligible individual by mail. General notices placed in newspapers, or posters placed in the State welfare offices, will not by themselves constitute sufficient notice, although such general notice can be used in addition to individual notices.

2. Notices must be written in easily understandable language.

3. Notices must explain that because of a recently passed law concerning Social Security benefits for disabled widows and widowers, the recipient of the notice may be eligible for no-cost or low-cost Medicaid. The notice must also explain that to find out if he or she is eligible for Medicaid, the recipient must file a written application for Medicaid before July 1, 1987. Applications filed after June 30, 1987 will not be processed, and the

individual will not be eligible for Medicaid under this provision of the law. The notice must also explain that individuals may receive up to 3 months retroactive Medicaid (although no Medicaid prior to July 1, 1986). Since retroactivity is based on the month in which the individual applies, individuals should file applications before October 1, 1986 to receive the maximum amount of Medicaid coverage.

4. Notices must include specific information about how the individual can file an application for Medicaid, including the address of the local welfare office if possible. A telephone number which the individual can call for more information must also be included, particularly if the notice does not provide specific addresses where applications can be filed.

5. Notices should instruct recipients to bring the notice with them when they apply for Medicaid.

IM 3448.6 *Processing of Applications*. – Upon receipt of an application for Medicaid under section 12202 of COBRA States must make a determination of the applicant's eligibility, based on the eligibility criteria set forth in section 3448.1 above. States must make such a determination both for applicants not currently eligible for Medicaid, and for applicants who are currently eligible as medically needy or under one of the optional categorically needy groups. To assist the States in making eligibility determinations, benefit history information will be included in the SSA computer tapes HCFA will mail to the States on or about August 1, 1986. The requirements concerning processing of applications in 42 CFR 435.911-914 apply to applications filed under section 12202 of COBRA.